

Final Round Confidential Instructions – State of California

The State has filed suit against Mr. Massanet individually under the responsible corporate officer doctrine. Massanet is seventy-five years old. He is thinking of retiring from company service due to personal health issues. Massanet's attorneys have agreed to meet to discuss the applicability of the doctrine under the facts, and whether there is any potential to reach a settlement without a trial.

You have an inkling that Massanet will argue that in the operations phase, he had no control over environmental matters. Your review of the record of evidence will give you some contrary arguments. Even assuming no control during mining, that wouldn't change his role in the decisions at startup that led to the leaky tailings facility. Not to mention your view that he pretty much told the mine manager to put the 100,000 gallons of slurry into the facility after the cease and desist order. You know he'll argue that he reasonably relied on qualified consultants and subordinates in making the decisions that he did. In settlement, this is not a bad equitable argument, but you know that if it comes to it in litigation, the law is otherwise.

You want two things: a substantial penalty for the past conduct, and a prospective injunction to get the site cleaned up. Massanet was the chief corporate policy and decision maker and, in the State's view, he had the power and authority to remedy the problem. His actions and inactions caused the plume to grow and the clean up to become exorbitantly expensive. He should pay a substantial penalty. And to ensure compliance with the injunction, he should be on it too.

Sainte Devote has disclosed that they are defending Massanet under a directors and officers insurance policy, but the State does not know the amount of the policy. One thing you do know is the policy won't cover penalties. Sainte Devote will be covering any penalty payment under its duty to indemnify its officers for liability arising from actions taken in the course and scope of employment.

1. Penalty

The applicable penalty statute provides for penalty liability of up to fifteen thousand dollars a day or up to \$20 per gallon for each gallon discharged. Liability is imposed on a daily or per-gallon basis but not both. In your view, Massanet pretty much told the mine manager to put the 100,000 gallons of tailings slurry into the leaky tailings facility after the regulatory agency ordered that no further tailings be deposited in the facility. After all, he didn't offer the mine manager any alternatives for what to do with it.

In litigation, the court would be required to consider these factors in assessing and imposing a penalty: the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and such other matters as justice may require.

You can argue that this act merits the maximum penalty, but, in settlement, you should be willing to take less. While Reality's opinions generally support the conclusion that depositing

the tailings in the facility caused a pollution spike, the 100,000 gallons was the volume of tailings slurry to the facility. You don't know the precise amount of pollutants released to the groundwater through the leaky liner or the rate of leakage through the liner.

- 100,000 gallons times \$20/gallon is \$2,000,000.
- \$15,000 a day equals \$5,475,000 per year (\$1,368,750 per quarter).

Assume the statute of limitations for these type of penalties is three years. Your objective should be to get as much as you can. Sainte Devote is an international company with healthy balance sheets, but you recognize that payment of a large penalty in one installment may not be realistic. You should be willing to creative options such as one payment up front with installment payments later. Other options might include a smaller penalty payment with a larger deferred penalty that will kick in if the site is not cleaned up timely.

2. Injunction

Cal Sainte Devote is basically defunct and unable to take action on clean up. You want an injunction that will have some teeth and you want Massanet and the parent company, Sainte Devote, to be on it. You don't care whether or how they work out cost sharing with the County of Mirabeau for the injunction components, because, if they are on the injunction, you can enforce it against them regardless of any cost-share agreements.

You are aware that seeking prospective relief against a corporate officer -- putting him on the injunction with the company -- is a novel concept, but you believe the law is moving in that direction, and if there was ever a case where it was appropriate, this is it. There is authority that can be argued for and against such an outcome.

Be willing to consider leaving Massanet off the injunction if you get really good terms and Sainte Devote is on it. The better the terms, the more willing you should be to leave him off. Some items the injunction could include are the following, but if you can think of others, be creative:

- No further tailings will be deposited in the tailings facility. This is a no-brainer, since mining has ceased anyway. This also costs nothing.
- **Facility cover.** The tailings facility should be closed with a two-foot clay cover to reduce or eliminate intrusion of rainwater into the facility and percolation of water through the facility. This type of cap is a "tried-and-true" method, unlike the novel beaching technology proposed by Massanet as part of the facility liner. Your estimate for installation and seeding with native grasses is \$ 2 million. Periodic maintenance to control erosion and re-seed with a vegetative cover may be required.
- **Plume treatment.** Installation of a system to contain and treat the spreading pollution plume coming off the tailings facility is a must. Estimated capital outlay for installation is \$ 2 million, with annual operation & maintenance costs, potentially in perpetuity, of \$10,000.

- **A clean and reliable water supply for nearby residents.** This is a must. These residents could be hooked up by adding new connections to the municipal water system that comes from a local surface reservoir. Estimated capital outlay for hookup infrastructure is \$500,000. After that, annual fees might be \$500 per resident, times twenty residents, or \$10,000 per year. At some point it would probably be reasonable to expect the residents to pay for their own water, however, since municipal studies had estimated depletion of groundwater would require a hookup within fifteen years anyway.
- **A pit lake remedy.** Novel pilot technology exists to treat the pollutants in the pit in-situ for an initial capital outlay of \$ 1 million and annual operations & maintenance costs of \$50,000. A more expensive option is a treatment plant and reverse osmosis with a capital outlay of \$5 million and an annual operations & maintenance budget of \$10,000.
- **A time table.** The Mine's tardy response to the agency's regulatory orders has already allowed the plume to spread and caused cleanup to be more expensive. You want a schedule for compliance with the injunctive terms and should push for all of these elements to be in place within five years. Ten years should be outer limits. You should be willing to agree to a sunset clause on the injunction if everything is installed timely and running right, but it's up to you to bargain for when that sunset clause might occur.

If they are dead set against Massanet being on the injunction, you can always demand a higher penalty as a trade off. Given Cal Sainte Devote's financial status, however, you should seek to get Sainte Devote named on it, at a minimum, or the injunction might not be worth the paper the stipulated judgment is written on.